

1
2
3
4
5
6 **STATE OF WASHINGTON**
SNOHOMISH COUNTY SUPERIOR COURT

7 STATE OF WASHINGTON,
8 DEPARTMENT OF ECOLOGY,
9 Plaintiffs,

NO.

COMPLAINT

10 v.

11 ASARCO INCORPORATED, and
12 ASARCO CONSULTING,

13 Defendants.

14 The Plaintiff, the Washington State Department of Ecology (Ecology), as represented
15 by Christine O. Gregoire, Attorney General, and Elliott Furst, Senior Counsel, and Kristie
16 Carevich, Assistant Attorney General, hereby brings causes of action against the Defendant,
17 Asarco, Inc., (Asarco) under the Model Toxics Control Act (MTCA), Chapter 70.105D RCW.
18 Ecology alleges as follows:

19 **I. PARTIES**

20 1. Ecology is an administrative agency of the State of Washington. Ecology
21 possesses statutory authority to perform the management and oversight of toxic waste sites
22 designated for investigation and remediation under MTCA. RCW 70.105D.030.

23 2. Asarco is a "potentially liable person" (PLP) for the Everett Smelter Site (Site) in
24 Everett, Washington.

1 3. The Site is located in the area around the intersection of State Route 529 and
2 East Marine View Drive in Everett, Washington. Within the boundaries of the Site is a fenced
3 area (Fenced Area) located southwest of this intersection. The Fenced Area, which is about 4.7
4 acres in size, is an area in which arsenic trioxide processing occurred. The Fenced Area is the
5 subject of this action.
6

7 4. The Site, including the Fenced Area, is an area of real property where a release
8 of hazardous substances has occurred, and where hazardous substances have otherwise come to
9 be located.

10 5. Asarco is a former owner or operator of the Site, including the Fenced Area, and
11 a current owner or operator of the Site, including the Fenced Area. Asarco formerly owned or
12 possessed hazardous substances and arranged for disposal of hazardous substance at the Site,
13 including the Fenced Area. Asarco is also a generator of a hazardous waste which was
14 disposed of, or has otherwise come to be located, at the Site, including the Fenced Area.
15

16 II. JURISDICTION AND VENUE

17 6. This superior court has jurisdiction over this suit pursuant to RCW
18 70.105D.050(1) and (3)-(4), .060(2), and 060(4), providing for review of the first cause of action
19 to compel Asarco's compliance with Enforcement Order No. 02TCPNR-4059, the second cause
20 of action for reimbursement of Ecology's incurred investigative and remedial action costs, the
21 third cause of action for imposition of civil penalties of up to twenty-five thousand (\$25,000)
22 dollars for each day that Asarco refused without sufficient cause to comply with the Order, and
23 the fourth cause of action for securing such relief as is necessary to protect human health and the
24 environment.
25
26

1 7. Because the release of hazardous substances at issue in this action occurred in
2 Snohomish County, venue is proper in Snohomish County Superior Court. RCW
3 70.105D.050(5)(b).

4 III. BACKGROUND FACTS

5 8. Ecology hereby realleges paragraphs 1-7 of this Complaint.

6 The Model Toxics Control Act

7 9. In March of 1989, the citizens of Washington passed Initiative 97, which
8 enacted an innovative state toxic waste cleanup program. Initiative 97 was codified as the
9 Model Toxics Control Act (MTCA) under Chapter 70.105D RCW.

10 10. MTCA was enacted not only to protect each citizen's fundamental and
11 inalienable right to a healthful environment, but also to enforce each citizen's responsibility to
12 preserve and enhance that right. RCW 70.105D.010(1)

13 11. MTCA ensures that local governments and taxpayers do not bear the burden of
14 funding the cleanup of hazardous waste sites. Therefore, MTCA requires specific responsible
15 parties to pay for the costs of eliminating threats to human health and the environment. RCW
16 70.105D.010(2).

17 12. MTCA identifies specific categories of "potentially liable persons" (PLPs)
18 including any person whom Ecology finds, based on credible evidence, is the current owner
19 and operator of a contaminated facility, and any person who owned or operated a facility at the
20 time of the disposal or "release" of a hazardous substance. RCW 70.105D.020(16); .40. A
21 "potentially liable person" is responsible for all cleanup costs at a facility that result from a
22 "release" of a hazardous substance into the environment. RCW 70.105D.040.

23 13. To further the goal of the expeditious cleanup of hazardous waste, "potentially
24 liable persons" are strictly liable, jointly and severally, for all costs of investigating and
25 remediating releases of hazardous substances into the environment. RCW 70.105D.010(5);
26 .040(2).

1 14. MTCA does not require proof of specific intent to release a hazardous substance
2 in order to incur liability for remedial action costs. RCW 70.105D.020(20).

3 **The Everett Smelter Site: Past Use, Discovery of**
4 **Contamination and Enforcement by Ecology**

5 15. The Everett Smelter Site previously hosted a smelter plant that, at the turn of the
6 century, was one of the largest industrial facilities in Everett. In 1894, the Puget Sound
7 Reduction Company began operating the smelter, refining ores primarily from the Monte
8 Cristo mining district. Some of the ore from the Monte Cristo mining district contained over
9 25 percent total arsenic. To recover arsenic from the ore, an arsenic processing plant was
10 constructed on the southern end of the Site. The plant consisted of several structures, including
11 additional smoke stacks, flues, ovens and mills, and a large arsenic processing building.
12

13 16. In 1903, a corporation that subsequently became ASARCO Incorporated
14 (Asarco) bought and continued operating the smelter. Asarco subsequently dismantled the
15 smelter in 1914 and 1915.

16 17. Asarco sold the smelter and its surrounding land-holdings through a series of
17 transactions between 1914 and 1936 to different buyers, including the Weyerhaeuser Company
18 ("Weyerhaeuser"), the State of Washington Department of Transportation, the City of Everett
19 and Burlington Northern. In addition, 17.89 acres were purchased and subsequently developed
20 into residential neighborhoods. About 25 houses were built on property that is now within the
21 Fenced Area.
22

23 18. During an environmental investigation in 1990, Weyerhaeuser discovered an
24 outcrop of slag discovered on the hillside below East Marine View Drive. As part of the
25 investigation, slag, soil, and ground water samples were collected on Weyerhaeuser property
26

1 and analyzed for the presence of heavy metals. After receiving the data, Weyerhaeuser
2 notified Ecology that a release of a hazardous substance had occurred at the Site.

3 19. Ecology conducted an initial investigation of the Site in December 1990. The
4 investigation included a Site visit, historic research of the area, and a review of the data
5 previously submitted by Weyerhaeuser.
6

7 20. Ecology conducted a Site Hazard Assessment (SHA) of the Site in February
8 1991. The SHA consisted of a magnetic survey, to attempt to locate the extent of buried slag,
9 and collection of 20 surface soil samples that were analyzed for metals. Laboratory analysis
10 demonstrated releases of arsenic, cadmium, and lead to the soils found in the residential area
11 on the site.
12

13 21. Ecology conducted a "Pre-Remedial Investigation" (Pre-RI) in May 1991. The
14 Pre-RI consisted of the preparation of a site map and collection of additional soil samples. The
15 purpose of the investigation was to further characterize the nature and extent of elevated
16 concentrations of residual metals that were identified in the SHA. Results of the Pre-RI
17 confirmed releases of arsenic, cadmium, and lead in surface soils throughout the study area.
18

19 22. By letter dated August 29, 1991, Ecology notified Asarco of its status as a
20 "potentially liable person" under RCW 70.105D.040 after notice and opportunity for comment.
21 Asarco is a "potentially liable person" as a current owner, a former owner, an arranger for
22 disposal, and a generator of the hazardous substances that have come to be located at the site.
23 RCW 70.105D.040(1)(a), (b), & (c).
24
25
26

1 23. In April 1992 Ecology issued Enforcement Order No. DE92TC-N147 to
2 Asarco. This Order required Asarco to perform a Remedial Investigation/Feasibility Study and
3 certain Interim Actions to limit exposure of residents to arsenic and other metals at the Site.

4 24. In March 1994 Ecology issued the first amendment to Enforcement Order No.
5 DE92TC-N147. The first amendment required Asarco to perform additional interim actions
6 and prepare an interim deliverable remedial investigation report. The amendment also required
7 Asarco to undertake additional sampling for the remedial investigation and extended the
8 schedule.
9

10 25. The Washington State Department of Health (WDOH) and the Agency for
11 Toxic Substances and Disease Registry (ATSDR) collected hair and urine samples from site
12 residents in 1994. Analysis of these samples indicated that some people on the site were
13 exposed to greater than normal amounts of arsenic.
14

15 26. Subsequent to the hair and urine sampling, ATSDR sampled soil and house dust
16 at residences located in areas suspected of containing smelter demolition debris to further
17 define routes of exposure. Analysis of these samples indicated that soil and house dust at
18 residences within the former smelter property contained elevated concentrations of lead and
19 arsenic. ATSDR concluded that residents of two homes were being exposed to arsenic at
20 concentrations that represented an immediate threat to their health, and that lead found in
21 surface soil at one of the homes might pose a threat to the health of young children or women
22 of child-bearing age who lived in the home. ATSDR recommended that exposure to arsenic be
23 stopped as soon as possible and that blood lead testing be performed.
24
25
26

1 27. In 1994 and 1995, Asarco voluntarily implemented a property buy-out program
2 for the homes located in the Fenced Area. All but two of the homes were purchased as part of
3 this program.

4 28. In September 1995 Ecology issued Enforcement Order No. DE95TC-N350 to
5 Asarco. This Order required Asarco to immediately take action to stop the exposure to arsenic
6 of residents, pets, and others who resided in the two remaining houses at 520 and 534 East
7 Marine View Drive, within the Fenced Area. Thereafter, Asarco purchased these properties
8 and the families vacated them.

9 29. Pursuant to Enforcement Order DE92TC-N147, Asarco prepared an Interim
10 Deliverable report in April 1994 and a Remedial Investigation and Feasibility Study (RI/FS)
11 report (*Everett Smelter Remedial Investigation and Feasibility Study, prepared by*
12 *Hydrometrics, Inc. for ASARCO Inc. and dated September 1995*) for most of the study area.

13 30. Based on the analytical data collected during the SHA, Pre-RI, the RI/FS, other
14 sampling efforts by Asarco and Ecology and sampling efforts by ATSDR, there is evidence of
15 elevated concentrations of arsenic, cadmium, and lead in the soils. Based on analytical data in
16 the RI/FS report, there is evidence of arsenic and lead in ground water and arsenic and lead in
17 surface water on the Site. Based on the analytical data collected by ATSDR, there is evidence
18 of arsenic and lead in house dust on the Site.

19 31. Subsequent to issuance of Enforcement Order Nos. DE92TC-N147 and
20 DE95TC-N350 Asarco expanded its property buy-out program and purchased all but fifteen of
21 the residences in the area south of Broadway, east of Balsam Lane, north of Butler Street, and
22 west of East Marine View Drive. Since Asarco's purchase, all of the homes located within the
23
24
25
26

1 Fenced Area have been vacated and demolished. Many of the homes adjacent to the Fenced
2 Area have also been vacated, although Asarco is currently leasing some of these properties for
3 residential use.

4 32. In August 1996, Asarco proposed to Ecology a phased approach to cleaning up
5 the site, commencing certain activities as soon as possible. Ecology concluded that the initial
6 activities included in Asarco's proposal were consistent with the cleanup objectives set forth
7 by Ecology and contained in MTCA. Ecology issued Order No. DE97TC-N119, which
8 required Asarco to implement all of the initial activities included in Asarco's proposal.
9 However, Asarco and Ecology could not agree on cleanup levels to be applied to the Site, and
10 Asarco refused to comply with this Order.

11 33. In October 1997 Ecology and Asarco entered a mediated process which
12 included the City of Everett, Snohomish County, Snohomish Public Utility District,
13 Snohomish Health District, Everett Housing Authority, Northeast Everett Community
14 Organization, and Northwest Everett Neighborhood Association. The purpose of the
15 mediation was to thoroughly explore alternatives for cleaning up the Everett Smelter Site.
16 Mediation concluded in August 1998 without reaching agreement.

17 34. In July 1998, Asarco brought a preemptive challenge in Thurston County
18 Superior Court to any subsequent Ecology enforcement action under MTCA, in part
19 challenging liability for cleanup of much of the Site on constitutional grounds. Asarco did not,
20 however, challenge its liability to clean up the land it owned that included 7.2 acres previously
21 purchased, and which incorporated the Fenced Area. Ultimately, on appeal in 2002, the
22 Washington Supreme Court vacated a Thurston County superior court order that had held
23
24
25
26

1 imposition of retroactive liability under MTCA to be unconstitutional, and dismissed Asarco's
2 lawsuit without prejudice, holding it was not ripe for judicial review.

3 35. After public notice and comment, Ecology issued the Integrated Final Cleanup
4 Action Plan and Final Environmental Impact Statement for one portion of the Everett Smelter
5 Site (FCAP/FEIS) on November 19, 1999. The FCAP/FEIS required, among other things, that
6 all material within the Fenced Area with an arsenic concentration greater than 3,000
7 milligrams/kilogram (mg/kg, equivalent to parts per million) be excavated and sent off-site to a
8 facility permitted to accept such waste. This requirement was based on concern over leaving
9 high levels of contamination in an urban neighborhood that, if exposed, could constitute an
10 immediate threat to human health. For purposes of ensuring the long-term protection of human
11 health, Ecology decided the most highly contaminated soil (arsenic concentrations greater than
12 3,000 mg/kg) should be removed from the Fenced Area, and taken to an off-site facility
13 designed for the acceptance and long-term management of such waste.
14
15

16 36. In January 2000 Asarco issued the draft *Comprehensive Lowland Area*
17 *Remedial Investigation Report* (LL Report). This report indicated that (a) material located
18 within the top four feet of a portion of the Fenced Area contains arsenic concentrations from
19 residuals of flue dust in the thousands up to 25,000 mg/kg, and from residuals of arsenic
20 trioxide in the hundreds of thousands up to 760,000 mg/kg; (b) materials containing residual
21 arsenic trioxide or flue dust can act as sources of arsenic to ground water under ambient
22 leaching conditions; (c) two surface run-off samples collected from the northeast corner of the
23 Fenced Area and two manholes south of the Fenced Area exceeded the City of Everett's sewer
24 discharge limit of 500 µg/L for arsenic; (d) there are approximately 20,000 to 25,000 cubic
25
26

1 yards of soil with arsenic concentrations greater than 3,000 mg/kg in an area of about 2.8 acres;
2 within that area, there are 1.4 acres containing approximately 10,000 to 15,000 cubic yards of
3 soil with arsenic concentrations over 10,000 mg/kg; these areas directly coincide with former
4 arsenic processing facilities located in this portion of the Fenced Area (e) arsenic loading from
5 the Fenced Area was on the order of 3-4 pounds per day during periods of storm water
6 sampling in January and February of 1999, with over 75 percent of the observed arsenic load
7 discharging to the City of Everett's sewer/storm water system. Asarco's report concluded that
8 it is likely that remediation activities planned for the fenced area would be successful in
9 intercepting and removing current sources of metals to ground water and surface water.
10 Asarco's report found that the best approach for addressing elevated arsenic concentrations
11 was to begin with the Fenced Area.
12

13
14 37. On June 10, 2002, Ecology issued Enforcement Order No. 02TCPNR-4059 to
15 Asarco.¹ Enforcement Order No. 02TCPNR-4059 required Asarco to perform an interim action
16 to remove the most contaminated material within the Fenced Area of the Site, consisting of
17 arsenic concentrations exceeding 3,000 parts per million (ppm). Specifically, the enforcement
18 order required Asarco to excavate and send to an off-site facility all flue dust, arsenic trioxide,
19 soil, and any other material with an arsenic concentration exceeding 3,000 ppm. The Order
20 clearly required that mobilization of equipment to the Site for soil excavation and removal
21 occur no later than April 30, 2003, and all work was to be completed by October 30, 2004.
22 These timelines were chosen to guarantee Asarco would commence work in the 2003
23

24
25 ¹ A copy of Enforcement Order No. DE 02TCPNR-4059 is attached hereto as Exhibit A. Enforcement
26 Order No. DE 02TCPNR-4059 includes a map which shows the Site and in particular the Fenced Area of the Site
at increasing levels of detail.

1 construction season, with allowance for completion of work in a second construction season if
2 necessary. The Order further provided that failure to mobilize for cleanup by the April 30, 2003
3 deadline would be a violation of the Order, granting Ecology the right to seek appropriate legal
4 action including an action for penalties, in accordance with Chapter 70.105D RCW. Asarco's
5 failure to complete the interim action by the required date was a violation of the Order.
6

7 38. Upon Asarco's request, Ecology amended Enforcement Order No. 02TCPNR-
8 4059 in December of 2002, to allow Asarco to include removal of material outside of the
9 Fenced Area with arsenic concentrations exceeding 3,000 ppm, to remove material with
10 concentrations between 150 and 3,000 ppm and re-grade the site with clean fill to make it suitable
11 for residential development. The material outside the Fenced Area that was known to have
12 concentrations exceeding the 3,000 ppm limit was located along East Marine View Drive, within
13 the 7.2 acres of property previously purchased and owned by Asarco.
14

15 39. Enforcement Order No. 02TCPNR-4059 required Asarco to submit a work plan
16 for accomplishing the required cleanup work. Asarco submitted a draft work plan in December
17 2002. The work plan proposed accomplishing the required work over two years, but
18 acknowledged that delay of removal of material until 2004 would violate the Order. Asarco's
19 work plan indicated Asarco intended to send excavated material to its Tacoma Smelter Site,
20 but contained a contingency plan for actions to implement if the material could not be sent to
21 the Tacoma Site.
22
23
24
25
26

1 40. In a letter dated March 5, 2003, Asarco requested that Ecology modify
2 Enforcement Order No. 02TCPNR-4059 to incorporate its expectation of receiving federal
3 funding for cleanup.

4 41. In a letter dated March 18, 2003, Ecology approved Asarco's December 2002
5 draft work plan. In that letter, Ecology reminded Asarco that Enforcement Order No.
6 02TCPNR-4059 required mobilization of equipment to the site no later than April 30, 2003.
7 The letter further stated that Ecology expected Asarco to begin implementing the work plan by
8 mobilizing equipment to the site by April 30, 2003. The letter stated that failure to perform
9 these actions would be viewed as non-compliance with, and a violation of, the Order.
10

11 42. In a letter dated April 7, 2003, Ecology denied Asarco's March 5, 2003, request
12 for a modification to Enforcement Order No. 02TCPNR-4059, based on the fact that federal
13 funding was not secure and that the highly contaminated soil would need to be removed from
14 the residential area as quickly as possible. In that letter, Ecology also stressed that the April
15 30th deadline was approaching, and that strict adherence to the timetable in the Order was
16 crucial to ensure maximum use of the upcoming construction season.
17

18 43. In a letter dated April 29, 2003, Asarco responded to Ecology's April 7 and
19 March 18 letters by citing to delays in its ability to dispose of the excavated soils at the
20 Tacoma Smelter Site. Asarco also again addressed the potential for federal funding to be
21 applied to the cleanup. Asarco attached a work plan to the letter, and stated that the path upon
22 which it would proceed could attain the ultimate outcome of the Order.
23

24 44. An Ecology representative visited the fenced area on May 1, 2003, and
25 observed no equipment or activity within the Fenced Area.
26

45. In a letter dated June 3, 2003, Ecology notified Asarco that that the work plan and subsequent field work addressed in Asarco's April 29th letter did not comply with Enforcement Order No. 02TCPNR-4059 and that Asarco was in violation of the Order. Ecology reminded Asarco that the purpose of the Order was to have Asarco begin removal of hazardous waste from the Site during the 2003 construction season, with allowance for using the 2004 construction season if necessary. The letter further stated that, despite any good faith efforts on Asarco's part, Asarco was obligated by state law to comply with the Order regardless of whether federal funds were available or it was able to dispose of the material at the Tacoma Smelter Site. Ecology informed Asarco that Ecology would take all necessary steps to ensure compliance with the Order.

IV. CAUSES OF ACTION

FIRST CAUSE OF ACTION

ENFORCEMENT OF MTCA ORDER

46. Ecology hereby realleges paragraphs 1 through 45 of this Complaint.

47. Asarco is a “potentially liable person” (PLP) for the Site. RCW 70.105D.020(12); .040.

48. Under MTCA, Ecology possesses statutory authority to require PLPs to conduct remedial actions to address releases or threatened releases of hazardous substances. RCW 70.105D.030(1)(b).

49. Through Enforcement Order No. 02TCPNR-4059 Ecology required Asarco to mobilize equipment for excavation of soils from the Fenced Area of the Site by April 30th, 2003.

FOURTH CAUSE OF ACTION

**RELIEF NECESSARY TO PROTECT
HUMAN HEALTH AND THE ENVIRONMENT**

68. Ecology hereby realleges Paragraphs 1 through 67 of this Complaint.

69. As of the current date, Asarco has failed to comply with Enforcement Order No. 02TCPNR-4059.

70. Because Asarco has failed to comply with Enforcement Order No. 02TCPNR-4059, hazardous substances within the Fenced Area still exceed applicable state cleanup standards under MTCA, and releases of hazardous substances are still occurring into the soil and ground water at the Site.

71. The hazardous substances existing at the Site represent a threat to human health and the environment.

72. The Attorney General is authorized under MTCA to file suit on behalf of Ecology to secure such relief as is necessary to protect human health and the environment. RCW 70.105D.050(4).

73. The Court should order Asarco to immediately come into compliance with the requirements of Enforcement Order No. 02TCPNR-4059 in order to remediate the threat to human health and the environment presented by the current conditions at the Site. This will require Asarco to comply with the Work Plan previously approved by the parties. Compliance with the Order and the Work Plan means Asarco must excavate and remove the contaminated soils with arsenic concentrations exceeding 3,000 mg/kg within the Fenced Area during the 2003 construction season as required by the approved work plan. This will require excavation and removal in 2003 of an estimated 4,660 cubic yards of material with concentrations exceeding 3,000 mg/kg out of an estimated total of 24,460 cubic yards. The remainder of the material with

1 arsenic concentrations exceeding 3,000 mg/kg (an estimated 19,800 cubic yards) is to be removed
2 in 2004.

3 **V. RELIEF REQUESTED**

4 WHEREFORE, Ecology respectfully request that this Court grant the following relief:

- 5
- 6 1. Order Asarco to comply with Enforcement Order No. DE 02TCPNR-4059 by
7 immediately mobilizing equipment for excavating and removing soils within the
8 Fenced Area.
 - 9 2. Order Asarco to comply with Enforcement Order No. DE 02TCPNR-4059 by
10 complying with the Work Plan previously approved by the parties. This will
11 require removing an estimated 4,660 cubic yards of material with arsenic
12 concentrations exceeding 3,000 mg/kg within the Fenced Area during the 2003
13 construction season and an estimated 19,800 cubic yards of material with
14 arsenic concentrations exceeding 3,000 mg/kg in the 2004 construction season.
15 This removal is to occur whether or not Asarco is successful in gaining approval
16 to dispose of material at its Tacoma Smelter site and whether or not funds are
17 allocated from the Trust Fund.
 - 18 3. Order Asarco to reimburse Ecology for the moneys spent for investigative and
19 remedial actions and orders with regard to the Fenced Area in particular.
 - 20 4. Assess a Civil Penalty against Asarco for each day that it refused, without
21 sufficient cause, to comply with Enforcement Order No. DE 02TCPNR-4059.
 - 22 5. Award to Ecology its statutory fees and costs under Chapter 4.84 RCW.
 - 23 6. Award to Ecology its reasonable attorneys' fees and litigation expenses incurred
24 herein.
 - 25 7. Award to Ecology its prejudgment interest on the moneys spent by Ecology for
26 investigative and remedial actions and orders.
 8. Award to Ecology such other relief as the Court deems just and equitable.

1
2 9. Enter a Judgment awarding the aforementioned relief.

3 DATED this ____ day of June, 2003.

4 CHRISTINE O. GREGOIRE
5 Attorney General

6 ELLIOTT FURST, WSBA #12026
7 Senior Counsel

8 KRISTIE CAREVICH, WSBA #28018
9 Assistant Attorney General

10 Attorneys for Plaintiffs
11 State of Washington
12 Department of Ecology
13 (360) 586-6770
14
15
16
17
18
19
20
21
22
23
24
25
26